Supreme Court, U.S.
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No. 05-668

IN THE

Supreme Court of the United States

ED BUSS, in his official capacity as Superintendent of the Indiana State Prison,
Petitioner,

v.

MARK ALLEN WISEHART,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. In jury bias claims, does the Sixth Amendment require a presumption of prejudice that the prosecution must disprove?

2. If so, was this rule "clearly established" by this Court for habeas corpus purposes in light of *Smith v. Phillips*, 455 U.S. 209 (1982), *United States v. Olano*, 507 U.S. 725 (1993), and a well-established circuit conflict over the rule?

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PETITION FOR A WRIT OF CERTIORARI

The State of Indiana, through Superintendent of the Indiana State Prison Ed Buss, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit granting Mark Allen Wisehart a writ of habeas corpus from his convictions and sentence of death.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at *Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005), *reh'g and reh'g en banc denied.* The order of the district court (Pet. App. 10a) is unreported. The opinion of the Indiana Supreme Court on Wisehart's petition for state post-conviction relief (Pet. App. 60a) is reported at *Wisehart v. State*, 693 N.E.2d 23 (Ind. 1998), *reh'g denied, cert. denied*, 526 U.S. 1040 (1999). The opinion of the Indiana Supreme Court on Wisehart's direct appeal (Pet. App. 128a) is reported at *Wisehart v. State*, 484 N.E.2d 949 (Ind. 1985), *reh'g denied, cert. denied*, 476 U.S. 1189 (1986).

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2005. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on June 24, 2005. Pet. App. 154a. On September 16, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to November 21, 2005 (No. 05A268). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

The United States Court of Appeals for the Seventh Circuit granted a writ of habeas corpus under 28 U.S.C. § 2254 to Mark Allen Wisehart, a prisoner of the State of Indiana who has been sentenced to death for his 1983 Madison County, Indiana convictions for murder, robbery, burglary, and theft. The court granted habeas relief because it concluded, in conflict with decisions from the First, Second, Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia circuits, but in agreement with the Third and Fourth Circuits, that Wisehart was entitled to a presumption of prejudice on his juror bias claims that the prosecution would be required to rebut at a hearing.

The Indiana Supreme Court considered this issue on appeal from denial of Wisehart's petition for state post-conviction relief and concluded that the Sixth Amendment does not require such a hearing or presumption. Pet. App. 124a-125a. That judgment was overruled by the decision below, notwithstanding (1) a deep circuit conflict over the issue and (2) the requirement of 28 U.S.C. § 2254(d)(1) that state court rulings be upheld unless they contravene or unreasonably misapply "clearly established" federal law. The decision below ignored both the section 2254 standard and decisions from other circuits and this Court saying that a rule is not "clearly established" for section 2254 purposes where it is the subject of a the circuit conflict.

1. The Underlying Facts

On direct appeal, the Indiana Supreme Court recited the following facts relating to Wisehart's crimes:

> The facts tend to show that at 10:30 p.m. on October 9, 1982, Anderson, Indiana police officer

Wasilewski entered Apartment 304 at 29th and Brown Streets. The police had received a phone call informing them they would find the body of a woman at that location. Officer Wasilewski, receiving this information by radio dispatch, found the body of Marjorie Johnson at said apartment. Her clothing was torn and wrapped around her mid-section and her head beaten and bloody. A bloody butter knife was lying near her body and numerous stab wounds appeared on her body. What appeared to be her billfold, with the contents removed and scattered was found on the bathroom floor.

Marjorie Johnson had been a regular visitor at the Christian Center where Mark Wisehart resided. The director of the Christian Center said that on the morning after the murder he noticed Mike Wisehart look at the papers, go straight to the article about Marjorie Johnson's murder, read it, and return the paper. Another resident of the Center, also named Johnson, said that earlier Wisehart had sent a letter to Johnson, talking about going to old people's houses and robbing them. The letter was put into evidence and it concluded by saying defendant Wisehart would be armed and would kill if anyone got in his way. Johnson testified that he talked to Wisehart after Marjorie Johnson's murder and Wisehart, aware Johnson would be a witness, said to him, "Try to make it look like I'm crazy." (Record at 1118).

On October 15, Officer Tracy and Detective Brown went to the Christian Center to pick up Mark Wisehart. He was cooperative and agreed to go to the police station. Once there, he executed a written waiver of rights and gave statements to the police confessing to this crime. In his statements to the police he admitted stabbing Marjorie Johnson several times with several weapons, striking her with his fist and hitting her about the head with a whisky bottle. He also stated he went through her purse and took

> fourteen ($14.00) dollars. He admitted it was he who had tipped off the police, disguishing his voice in a high-pitched manner to sound like a woman. An autopsy performed by forensic pathologist John Pless indicated there were several severe blunt force injuries and fractures to Marjorie Johnson's head and thirteen stab wounds to her body. A photograph of her body shows cuts just at or below the left jawbone, stab wounds to the chest and one on the left shoulder. The fibroid cartilage commonly called the "Adam's apple" was fractured with hemorrhage and she also had broken ribs. The cause of death was determined to be multiple blunt force injury to the head and multiple stab wounds to the face and chest. The pathologist was not able to determine the time of death.

Pet. App. 129a-130a.

2. The State Court Proceedings

The State of Indiana charged Wisehart with murder, robbery, burglary, and theft. A jury found Wisehart guilty and recommended that Wisehart be sentenced to death. The state trial court agreed and followed that recommendation. Pet. App. 128a-129a.

On direct appeal, Wisehart raised claims that are unrelated to this petition. The Indiana Supreme Court affirmed the convictions and sentence. Pet. App. 128a. The state supreme court denied rehearing and this Court denied certiorari review. *Wisehart v. Indiana*, 476 U.S. 1189 (1986).

Next, Wisehart filed a petition for state post-conviction relief in the trial court. Among the claims he raised was that his jury was biased against him insofar as a juror learned mid-trial from an unknown, extraneous source that the reason for a delay in the trial was that Wisehart had taken a polygraph examination. At the evidentiary hearing,

Wisehart's only evidence regarding this claim was an affidavit from the juror who had learned of the polygraph. Pet. App. 124a-125a. Wisehart presented no evidence as to whether the juror knew of any results of that examination or if the juror told anyone else the information. *Id.* However, the record established that the jury had been instructed, after the relevant incident but before their deliberations, to "disregard any and all information that you derive from any other source," other than the evidence actually presented at trial. Pet. App. 157a. The record also established substantial evidence of guilt, including a detailed confession. Pet. App. 129a-130a. The state post-conviction court rejected his claim.

The Indiana Supreme Court affirmed on appeal. With regard to the juror claim, the state supreme court held that Wisehart's evidence failed to demonstrate that the juror's knowledge "had an impact on the jury verdict or were [*sic*] used improperly in arriving at a verdict." Pet. App. 124a-125a. The Indiana Supreme Court denied rehearing and this Court denied certiorari review. *Wisehart v. Indiana*, 526 U.S. 1040 (1999).

3. The Federal Habeas Corpus Proceedings

Wisehart then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Indiana. Among other claims, Wisehart argued that the Indiana Supreme Court incorrectly adjudicated his jury bias claim. The district court denied the petition, finding that the Indiana Supreme Court's adjudication of the juror claim was neither contrary to nor involved an objectively unreasonable application of clearly established federal law. Pet. App. 37a-39a. Furthermore, the district court noted that any error in that regard was harmless given curative jury instructions and overwhelming evidence of Wisehart's guilt. Pet. App. 39a. However, the district court granted a certificate of appealability on the issue.